

In re) Fair Hearing No. 15,645
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Appeal of)

The petitioner appeals a decision by the Department of Social Welfare denying coverage for acupuncture treatments under the VHAP program.

1. The petitioner is a thirty-seven-year-old man who earns his living as an apiarist (beekeeper). He has been found eligible for VHAP benefits and has been treated for several years for recurrent significant pain in his jaw, wrists and elbows. He has tried many forms of relief, including physical therapy, massage, bee stings and ultrasound therapy to relieve his pain. He has had little success. He has, however, received a considerable amount of relief through acupuncture treatments. These treatments were prescribed by his medical doctor who supports their continuance. The petitioner cannot afford to continue to pay for these treatments and applied to VHAP for coverage in 1997.

2. The petitioner was denied coverage by his managed care provider "Blue First" under the VHAP program in 1997, but no letter of denial and appeal rights was mailed to him. (The denial went to his physician.) The petitioner

continued to pursue this matter throughout 1998 and after receiving an oral denial by telephone on September 8, 1998, in which he was informed for the first time of his right to go before the Board on this issue, the petitioner immediately filed the current appeal.

3. The Department based its decision on a specific provision in the Medicaid regulations which excludes acupuncture from coverage due to the newness of the technique. In September of 1998, when the petitioner was denied, the VHAP regulations specifically referred to the Medicaid regulations for the definition of coverage. That Department further stated that no regulation covering acupuncture could be put in place under the terms of that regulation until an assessment had been done by the National Institutes of Health as to efficacy of this procedure for alleviating pain.

4. The petitioner responded to this latter allegation by providing the Department with documents showing that the required assessment had been done and published on November 3-5, 1997. The "conclusion" of the extensive report was as follows:

Acupuncture as a therapeutic intervention is widely practiced in the United States. While there have been many studies of its potential usefulness, many of these studies provide equivocal results because of design, sample size, and other factors. The issue is further complicated by inherent difficulties in the use of appropriate controls, such as placebos and sham acupuncture groups. However, promising results have emerged, for example, showing efficacy of acupuncture in adult postoperative and chemotherapy nausea and

vomiting and in postoperative dental pain. There are other situations such as addiction, stroke rehabilitation, headache, menstrual cramps, tennis elbow, fibromyalgia, myofascial pain, osteoarthritis, low back pain, carpal tunnel syndrome, and asthma, in which acupuncture may be useful as an adjunct treatment or an acceptable alternative or be included in a comprehensive management program. Further research is likely to uncover additional areas where acupuncture interventions will be useful.

The study also listed a number of issues that need to be addressed in order to incorporate acupuncture into the health care system including the training and credentialing of practitioners; the adoption of safety standards to safeguard against risks; the education of patients; and the removal of financial barriers to payment for the service. With regard to this last issue the report stated:

There is evidence that some patients have limited access to acupuncture services because of inability to pay. Insurance companies can decrease or remove financial barriers to access depending on their willingness to provide coverage for appropriate acupuncture services. An increasing number of insurance companies are either considering this possibility or now provide coverage for acupuncture services. Where there are State health insurance plans, and for populations served by Medicare or Medicaid, expansion of coverage to include appropriate acupuncture services would also help remove financial barriers to access.

5. The petitioner relies on the above report to argue that acupuncture has been proven effective in the relief of pain in the elbows, wrists (carpal tunnel syndrome) and jaw and, as such should now be covered through the Medicaid regulations. He further argues that the report is a plea to public insurance programs to cover these services. The Department acknowledges that the above report is the one

contemplated by the regulations but dismisses the report as ambiguous and non-conclusive. It has declined in the context of this hearing to make any changes to the Medicaid regulation based on this report.

6. Following this exchange, the petitioner provided a written legal argument. In response to that argument the Department provided further information showing as follows:

a. The agreement signed by the Department with the Department of Health and Human Services which granted the Department a waiver under the Medicaid program to operate its own state VHAP program specifically states that "acupuncture, acupressure or massage therapy" will "not be provided through the pre-paid health plans." See "The Vermont Health Access Plan: A Statewide Medicaid Demonstration Waiver Initiative", February 23, 1995, Section Three (General Exclusions), p. 27-28.

b. The contract signed with the managed care provider, Blue First, states that "[i]n addition to the specific exclusions listed elsewhere in this document, benefits will not be provided through the pre-paid health plans for the following. . . (9) Acupuncture, acupressure or massage therapy." See "Vermont Health Access Plan: Health Plan Contract 1998", December 8, 1997, Section Four (General Exclusions), Attachment G, page 27.

ORDER

The decision of the Department is affirmed.

REASONS

The VHAP regulations adopted on September 7, 1996, refer to different standards for persons receiving VHAP who had not yet been assigned to a managed health care plan and those who had. The former group was termed "VHAP-Limited" (fee-for-service) recipients and their coverage was spelled out in the procedures manual. Those procedures contained a category called "General Exclusions" which explicitly excluded payment for "acupuncture, acupressure or massage therapy." P-4003(C)(9). Persons enrolled in a managed health care plan were eligible for "an expanded scope of services" which included, in pertinent part, as follows:

The following services, as defined in the Medicaid State Plan and by Medicaid regulation, are subject to negotiated contract provisions and must be accessed through the recipient's primary care provider (Medicaid regulatory citations are indicated where applicable):

. . .

- physician services (M600-618)

. . .

W.A.M. 4003.1

The Medicaid regulation referenced above at M613.1 specifically describes coverage for acupuncture services:

Acupuncture

Although acupuncture has been established for thousands of years in other parts of the world, it is a new technique in this country. Three units of the National Institutes of Health have been designated to assess the

use of acupuncture for anesthesia and relief of chronic pain. Until that assessment has been completed and its efficacy has been established, no payment will be made for acupuncture.

In October of 1998, the above regulation was amended to require those in the managed care VHAP program to obtain referrals from their primary care provider for "physician's services." W.A.M. 4003.1(A). Under the new regulations, each managed health care plan is now required to provide its members with a handbook showing what services are provided under its contract. W.A.M. 4003.2. Under the Department's current contract with Blue First (the petitioner's managed care provider) acupuncture services are specifically excluded.

In summary, the VHAP regulations specifically exclude coverage of acupuncture for all VHAP recipients who are not in managed care and for all VHAP recipients in the managed care program beginning October 19, 1998. For those in managed care between September 7, 1996 and October 19, 1998, acupuncture coverage is defined by the Medicaid acupuncture regulation which also declines to cover that service subject to the completion of the NIH report. The petitioner, who is in the managed care program, does not argue that the Department's outright exclusion of acupuncture payments under the VHAP program is illegal or in conflict with some other regulation (although he certainly believes that it is

an unfair and ill-advised policy decision).¹ He does argue, however, that when he applied, which was prior to October 19, 1998, he should have been found eligible for acupuncture treatments under the Medicaid regulation because the 1997 NIH study had been positive on the benefits of acupuncture and the regulations should have allowed them at that time.

The petitioner's frustration in this matter is more than understandable. To begin with, he has had a difficult time in learning of his rights from the Department's managed care contractor. He has then jumped through all of the hoops put in his path regarding documentation of his medical need and documentation of the NIH findings with very little response from the Department. The NIH's complex and often positive findings in its "Consensus Report" were facilely and summarily dismissed in the Department's communications with the petitioner. The petitioner's repeated requests for answers regarding the existence of ongoing policy discussion at DSW as to the inclusion of such services at some time in the future have received no reply. Throughout these proceedings, the level of responsiveness to the petitioner for whom this is obviously a matter of great concern, has been, to put it bluntly, not what one would hope for in a public agency.

¹ The Medicaid waiver agreement between Department of Social Welfare and the federal Health and Human Services described in the above, appears to specifically require exclusion of this service as a condition for operation of the VHAP program.

That being said, however, it must be made clear that the fair hearing Board has no power to intervene in questions of policy formulation, which is essentially what this case comes down to. The Medicaid regulation at M613 relied on by the petitioner in support of his request says that acupuncture will not be covered. There is a suggestion in that statement that the matter would be reviewed again after the NIH report, but the regulation makes no promise that even a positive report would result in coverage of these services. It cannot be concluded that the regulation at issue ever provided for coverage of acupuncture services.

The September 1996 regulation governing VHAP managed care also contains a provision that all services defined in the Medicaid regulations are further "subject to negotiated contract provisions." See supra. The contract provisions which were in effect during 1997 and 1998 with Blue First specifically excluded acupuncture treatments. Thus, even if the Medicaid regulation had provided for acupuncture treatments, that regulation would have been over-ridden by the actual services contained in the Blue First contract.

Finally, a determination of whether the services were covered prior to the new regulations of October 1998, is most likely a moot one since the petitioner's primary concern here is the future payment of acupuncture services which he utilized for pain relief, not the repayment of those few services he was able to pay for himself during

that prior period. The coverage of these services is now completely defined in the contract with the managed care providers which contract unequivocally eliminates coverage of acupuncture under the VHAP program and makes no further reference to Medicaid or its regulations at all. Therefore, even making a formal request that the Department to review its Medicaid regulation forbidding acupuncture is of no legal use to the petitioner at this point since he is not a Medicaid recipient.

As the Department's decision denying VHAP acupuncture coverage to the petitioner is in accordance with its regulations, the Board is bound to uphold the Department's decision. 3 V.S.A. § 3091(d). Fair Hearing Rule 17.

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